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# Supreme Court of the United States

OCTOBER TERM, A. D., 1949.

No. 180

BROTHERHOOD OF RAILROAD TRAINMEN, A VOLUNTARY UNINCORPORATED ASSOCIATION, PETITIONER,

VS.

HAROLD H. TEMPLETON, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, A CORPORATION, AND PANHANDLE AND SANTA FE RAILWAY, COMPANY, A CORPORATION, RESPONDENTS.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

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## SUBJECT INDEX TO PETITION FOR WRIT OF CERTIORARI


Summary Statement of the Matters Involved ..... 2-7
This Court Has Jurisdiction ..... 7-9
Questions Presented ..... 9-12
Reasons Relied on for the Allowance of the Writ ..... 12-15


## SUBJECT INDEX TO BRIEF IN SUPPORT OF PETITION


Opinions of Courts Below ..... 16
Jurisdiction ..... 17
Statement of the Case ..... 17
Assignments of Error Intended to Be Urged ..... 17-18

Argument—

I. This Court should decide whether a collective bargaining agreement is void for the reason that the subject matter thereof involves the subject matter of a dispute previously decided by the National Railroad Adjustment Board, First Division, by awards which, on collateral attack by third persons, the Court of Appeals has declared are void ..... 19-24

II. This Court should resolve the probable conflict between the decision of the Court of Appeals and the applicable decisions of this Court on the question of a federal court's jurisdiction to determine a jurisdictional labor dispute arising under the Railway Labor Act, and to interpret and apply collective agreements and employment relations between the Carrier and those claiming under the same ..... 24-26

III. This Court should resolve the probable conflict between the decision of the Court of Appeals

and the applicable decisions of this Court on the question of the jurisdiction of a federal court to determine the craft classification of alleged employees of the Carrier under § 3, First, (h) of the Railway Labor Act of 1934 (45 U. S. C., § 153, First (h) ..... 26-28

IV. This Court should resolve the probable conflict between the decision of the Court of Appeals and the applicable decisions of this Court on the question of the jurisdiction of a federal court to judicially review and hold award of the National Railroad Adjustment Board void in a collateral attack thereon upon the ground that the Board exceeded its jurisdiction in making such awards ..... 28-29

V. This Court should decide whether the jurisdictional amount of $3,000.00, necessary to sustain Federal jurisdiction, has been proved in this "spurious" class action brought under Rule 23 (a)(3), Federal Rules of Civil Procedure ..... 30-31

Conclusion ..... 32

Appendix ..... 33-40

## TABLE OF CASES

Elgin, J. & E. Ry. Co. vs. Burley, 325 U. S. 711, 723-729, 739, 65 S. Ct. 1282 ..... 8, 9, 12, 15, 23, 29

General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Missouri-Kansas-Texas R. R. vs. Missouri-Kansas-Texas R. R. Co., 320 U. S. 323, 334, 335, 336, 337, 64 S. Ct. 146 ..... 9, 11, 15, 26, 27

General Committee of the Brotherhood of Locomotive Engineers vs. Southern Pac. Co. et al., 320 U. S. 338, 343, 344, 64 S. Ct. 142 ..... 9, 11, 15, 27

Lion Bonding & Surety Co. vs. Karatz, 262 U. S. 77, 85, 86, 43 S. Ct. 480 ..... 12, 31

Nord vs. Griffin, 7 Cir., 86 F. 2d 481 ..... 31

Order of Ry. Conductors of America vs. Southern Ry. Co., (No. 438, April 10, 1950, not yet officially reported) 70 S. Ct. 585, 586 ..... 8, 11, 14, 26

Order of Ry. Conductors of America vs. Pitney et al., 326 U. S. 561, 567, 568, 66 S. Ct. 322 ..... 8-9, 11, 14, 26

Order of Railroad Telegraphers vs. Railway Express Agency, Inc., 321 U. S. 342, 346, 347, 64 S. Ct. 582 ..... 23

Slocum vs. Delaware L. & W. R. Co., (No. 391, April 10, 1950, not yet officially reported) 70 S. Ct. 577, 579 ..... 8, 11, 14, 26

Switchmen's Union of North America vs. National Mediation Board, 320 U. S. 297, 300, 305, 64 S. Ct. 95 ..... 9, 11, 12, 14-15, 26, 27, 29

Virginian Ry. Co. vs. System Federation No. 40, 300 U. S. 515, 544, 545, 57 S. Ct. 592 ..... 8, 23

Washington Terminal Co. vs. Boswell, 124 F. 2d 235, 241, affirmed by an equally divided court June 14, 1943, 319 U. S. 732, 63 S. Ct. 1430 ..... 29

STATUTES CITED

Fifth Amendment, Constitution of United States ..... 3, 14, 18

Railway Labor Act of 1934, 48 Stat. 1185 ..... 7

Rule 23 (a) (3), Federal Rules of Civil Procedure ..... 4, 12, 18, 30

§ 1a, 2 First, 2 Ninth, Railway Labor Act of 1934 ..... 8

§ 2 Second, Railway Labor Act of 1934, Title 45, U. S. C., § 152 Second ..... 22

Tit. 45, U. S. C., § 153 (j) ..... 3, 14, 18, 27, 28

Tit. 28, U. S. C., § 1331, 1332 ..... 4, 12, 18, 30

45 U. S. C. A., § 151, et seq. ..... 7

45 U. S. C., § 153 (h) ..... 4, 11, 14, 18, 26, 27

45 U. S. C., § 153 First (m), (o), (p) ..... 9, 12, 15, 29

28 U. S. C., § 1254(1) ..... 7

45 U. S. C., § 151 (ff) ..... 7, 33

45 U. S. C., § 151a, 152 First, 152 Ninth ..... 8, 10, 11, 14, 23, 24, 27

# Supreme Court of the United States

OCTOBER TERM, A. D., 1949.

No. .....

BROTHERHOOD OF RAILROAD TRAINMEN, A VOLUNTARY UNINCORPORATED ASSOCIATION, PETITIONER,

VS.

HAROLD H. TEMPLETON, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, A CORPORATION, AND PANHANDLE AND SANTA FE RAILWAY, COMPANY, A CORPORATION, RESPONDENTS.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.**

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

May it please the Court:

The petitioner, Brotherhood of Railroad Trainmen, a voluntary unincorporated association and labor union, respectfully petitions this Honorable Court for a writ of cer-

tiorari to the United States Court of Appeals for the Eighth Circuit.

**Summary Statement of the Matters Involved.**

The parties involved are as follows: Your petitioner, which is the collective bargaining representative for Trainmen employees of the Carrier holding seniority as Brakemen with the Carrier. The respondent, Harold H. Templeton, who brought this suit June 26, 1946 (R. 1), for himself and the class of Express Messenger employees of the Railway Express Agency and the respondent Railway Companies which operate the Eastern and Western Lines and the Coast Lines of the Santa Fe System. They are known in this case as the Santa Fe, or the Carrier. The Express Messengers have a collective bargaining representative, namely—the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, a voluntary unincorporated association and labor union, otherwise known as the Clerks' Union. They do not have any collective bargaining agreement with the Carrier covering any relation they might have to the Carrier while doing the Carrier's baggage work, which is the subject matter of this particular controversy. The Clerks' Union does, however, have a collective agreement with the Railway Express Agency covering the Express Messengers' relations with that company (Plaintiff Exhibit P, R. 338, on file with this Court).

This case involves the jurisdiction of a Federal Court to abrogate, by permanent injunctive decree, collective bargaining agreements entered into pursuant to the mandate of, and in compliance with the provisions of the Railway Labor Act, between a railway labor union, which is the collective bargaining agent for the craft of employees represented by it, and the Carrier.

This case also involves the jurisdiction of the Federal Court to interpret and apply, by injunctive decree, the collective bargaining agreements of one group of the Carrier's employees and the claimed relations of another and adversary group, and to thus determine a jurisdictional dispute between the Carrier and the collective bargaining agent for a group of the Carrier's Trainmen employees holding seniority as Brakemen who are claiming, under

collective agreements with the Carrier, an exclusive right to handle the baggage work of the Carrier and another group, comprised of Express Messenger employees of the Railway Express Agency, who have their own separate collective representative but no collective bargaining agreement with the Carrier, and who claim a right to perform the same work by virtue of a relation with the Carrier, which the Courts below have held to be an employment at will.

This case also involves the jurisdiction of a Federal Court, in a collateral attack by third persons, in an injunction suit, to judicially review awards of the National Railroad Adjustment Board, First Division, deciding a dispute between the Carrier and the collective bargaining representative of a group of the Carrier's employees in favor of the collective representative's claimed proper interpretation and application of its collective agreement, and to decide that the Board, in making said awards, did not interpret and apply the collective agreement, but rather wrote a new agreement for the collective agent and the Carrier and, in so doing, acted beyond and in excess of its jurisdiction, perforce of which the awards are void.

The Court of Appeals has held that the awards of the National Railroad Adjustment Board, First Division, complained of by the Express Messengers, are void as to them, for being in violation of § 3(j) (Tit. 45, U. S. C., § 153 (j)) of the Railway Labor Act and of the Fifth Amendment to the Constitution of the United States, because they had no notice of the proceedings for the awards (R. 636, 637). This decision is conditionally precedent upon the further decision that the Express Messengers, when doing Santa Fe baggage work, are employees of the Santa Fe at will, and that

> "As such employees, they are and were 'trainmen' within the purview of § 3(h) (Tit. 45, U. S. C. A., § 153(h)) Railway Labor Act,"

and are entitled to notice as their employment with the Santa Fe was affected in the proceedings before the Board (R. 637).

Insofar as the Court of Appeals has held that the awards are void because of lack of notice to the Express Messengers, this case also involves the jurisdiction of a Federal Court to determine the craft classification of the Express Messengers for the purpose of establishing the jurisdiction of the National Railroad Adjustment Board, First Division, over disputes between members of a craft within the declared jurisdiction of the Board (45 U. S. C., § 153(h)) and the Carrier employer.

This case also involves the matter of whether the jurisdictional amount of $3,000.00 necessary to sustain federal jurisdiction (Tit. 28, U. S. C., § 1331, 1332) has been proved in this "spurious" class action brought under Rule 23 (a)(3), Federal Rules of Civil Procedure.

A permanent decree of injunction was granted by the District Court on March 30, 1949 (R. 76), upon the basis of the complaint of Harold H. Templeton (R. 1-12), and the District Court's Findings of Fact and Conclusions of Law (R. 63-76).

Within its own four corners, this case specifically involves the jobs of 150 employees of the Santa Fe holding seniority as Brakemen, who are now performing the Santa Fe's baggage work on all of its trains on its Eastern and Western Lines, and who have held these jobs since September 15, 1945 (R. 599). Prior to that date the work on most of these trains was handled by Express Messenger employees of the Railway Express Agency, operating in joint service, none of whom had any seniority rights with the Santa Fe (See Pre-Trial Order, R. 122-124, 285-288). As a class, there are about 275 Express Messengers who claim to be involved (R. 2).

The complaint (R. 1-12) alleges that since prior to April 1, 1892, the Railway Express Agency and the Santa Fe have jointly employed Express Messengers in what is termed "joint service." An Express Messenger, when in joint service, handles the express work of the Railway Express Agency and, at the same time he handles the baggage work of the Carrier. The Express Messengers claim that by virtue of a custom and practice to so employ them, they have acquired a property right to do the Carrier's baggage work. The Express Messengers claim that

they have been deprived of this right by virtue of six awards rendered by the National Railroad Adjustment Board, First Division, on April 20, 1942, in disputes between the petitioner and the Carrier, and by the Carrier's alleged compliance with those awards through its performance of certain agreements made by the Carrier with the petitioner subsequent to the awards. They claim that they were employees of the Carrier, involved in the disputes before the Board, and that because they were not given notice, the awards are void as to them. They claim the agreements made subsequent to the awards, between the petitioner and the Carrier, are likewise void because these agreements, they say, are merely an implementation of and made for the purpose of putting the awards into effect, and that the Carrier's compliance with these awards and these agreements is a denial of their property rights without due process of law.

Since 1892, there have been continuously in force and effect on the Carrier's Eastern and Western Lines and its Coast Lines collective bargaining agreements between the petitioner and the Carrier, prescribing the rules, rates of pay and working conditions for the trainmen employees of the Carrier, represented by the petitioner (Pre-Trial Order (4), R. 123).

The petitioner, in the proceedings before the National Railroad Adjustment Board, First Division, involving the questioned awards of the Board, protested the Carrier's assignment of its baggage work on trains on its Eastern and Western Lines to persons or groups other than its trainmen employees holding seniority with the Carrier as Brakemen, and claimed that under a proper interpretation and application of the collective agreement in force on the Eastern and Western Lines of the Carrier (Santa Fe Ex. 4, R. 538, 539, on file with this Court), such trainmen employees had the exclusive right to perform that baggage work. All of the awards sustain this claim. Some of the awards are money awards for the benefit of the individual trainmen and baggagemen involved (See Award 6635, Pltf. Ex. B, R. 130-177; Award 6636, Pltf. Ex. C, R. 177-219; Award 6637, Pltf. Ex. D, R. 219-249; Award 6638, Pltf. Ex. E, R. 249-266; Award 6639, Pltf. Ex. F, R. 267-285).

These awards were issued by the Board on April 20, 1942. The Carrier refused to comply with any of the awards but filed petitions for rehearing, which remained pending before the Board until May 3, 1944, when they were withdrawn by the Carrier (B.R.T. Ex. 9, R. 532-533). In January of 1944, and pursuant to a memorandum agreement of October 26, 1943, between the petitioner and the Carrier, known in this case as the Whitney-Engel Memorandum (B.R.T. Ex. 1, R. 505, 506), a large number of unsettled cases, including these particular awards, were treated as open questions for settlement by conference on the Carrier's property (B.R.T. Ex. 8, R. 528-530), and negotiations were entered into which resulted in certain agreements between the petitioner and the Carrier (B.R.T. Ex. 2, R. 506-508; B.R.T. Ex. 3, R. 509-511; B.R.T. Ex. 4, R. 511-513; B.R.T. Ex 5, R. 514-521).

Two of these agreements, B.R.T. Exs. 2 and 3, and portions of a third agreement, B.R.T. Ex. 5, settled and disposed of the past grievances, which were involved in the disputes decided by the Board's awards, and which arose out of the petitioner's claimed interpretation and application of its contract. While these agreements were being made or negotiated, a separate and new agreement was made February 3, 1944 (B.R.T. Ex. 4, R. 511-513). The new agreement thus made settled for the future the dispute concerning the coverage or meaning of the pre-existing collective agreement, Santa Fe Ex. 4. The dispute here arose out of the Carrier's denial of the petitioner's contention that the basic contract, and particularly Articles I, XXII and XXIII thereof (Santa Fe Ex. 4, pp. 1-8, 27-31, p. 31), when properly interpreted and applied, required the Carrier to assign the baggage service on all of its trains exclusively to its employees holding seniority as Brakemen. Petitioner claims that the new agreement of February 3, 1944, changes and amends the terms of the basic contract and that it is entirely prospective in that it settles, for the future alone, the dispute, and determines that the trainmen employees of the Carrier, holding seniority as Brakemen, have the exclusive right to the baggage work. Petitioner contends that this new agreement was made by it and the Carrier in pursuance of the power

and authority conferred by the Railway Labor Act to bargain collectively and to make a collective agreement.

The District Court found as a fact, and concluded as a matter of law, that all of these agreements, including the February 3, 1944, agreement, were made at the insistence and demand of petitioner and solely for the purpose of implementing and providing the practical means of putting the awards into effect, and that they did not modify, alter, change or amend the basic collective agreement, Santa Fe Ex. 4. The District Court further concluded that since it found the awards to be void, these agreements were likewise void (R. 63-75-79).

The Court of Appeals, by its opinion and judgment, rendered April 14, 1950, sustained the findings and conclusions of the District Court and affirmed that Court's judgment and decree (R. 623-640).

Petitioner filed petition for rehearing on April 28, 1950 (R. 641-652). Rehearing was denied by the Court without opinion, May 9, 1950 (R. 653).

**This Court Has Jurisdiction.**

By this petition, petitioner seeks a review of a final judgment and decree of the United States Court of Appeals for the Eighth Circuit, affirming, on petitioner's appeal, the final judgment and decree of injunction of the District Court. Jurisdiction of this Court to review such final judgment and decree is accorded by 28 U. S. C., § 1254(1).

This case presents issues of Federal law of grave importance, involving the operation of the Railway Labor Act of 1934, 48 Stat. 1185; 45 U. S. C., § 151(ff); 45 U. S. C. A., § 151, *et seq.*

1. Of immense importance as affecting all employees in the railroad world, whose very livelihood depends upon the collective agreements made on their behalf by their collective bargaining representatives with their Carrier employers, is the issue in this case as to whether a collective agreement which changes, alters, or amends a preexisting collective agreement, and settles for the future the

rights of the employees covered thereby, is to be declared void because the subject matter of that agreement was the subject matter of an earlier dispute with the Carrier, arising under the pre-existing agreement and which was decided by awards of the Adjustment Board, subsequently declared to be void, in a collateral attack proceeding in a Federal Court brought by third persons long after the awards were rendered, long after the new agreement was made and long after the new agreement was put into effect. The issue here is not whether the awards of the Board are valid or invalid. It is the issue of whether at any stage of a continuing dispute between the collective agent and the Carrier there is such a limitation or restriction on the collective bargaining power and authority conferred by the Railway Labor Act as will nullify the collective procedure, itself and the results thereof. §§ 1a, 2 First, 2 Ninth, Railway Labor Act of 1934; 45 U. S. C., § 151a, 152 First, 152 Ninth; *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 544, 545, 57 S. Ct. 592; *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U. S. 711, 723-729, 739, 65 S. Ct. 1282; *Slocum* v. *Delaware L. & W. R. Co.*, (No. 391, April 10, 1950, not yet officially reported) 70 S. Ct. 577, 579. Insofar as your petitioner is informed, the question of the existence of such a limitation or restriction has never been passed upon by this Court, and, to the end of preserving the orderly administration of the Act and the rights of all railroad employees affected by the Act, it should be settled by this Court.

2. The Court of Appeals has decided the important questions of Federal law as to the jurisdiction of a Federal Court to settle, by injunctive decree, a jurisdictional labor dispute and to interpret and apply collective bargaining agreements and employment relations of those claiming to be employees of the Carrier in favor of such jurisdiction. On this issue, the decision of the Court of Appeals is probably in conflict with the applicable decisions of this Court in *Slocum* v. *Delaware L. & W. Ry. Co.*, (No. 391, April 10, 1950, not yet officially reported) 70 S. Ct. 577, 579, 580; *Order of Ry. Conductors of America* v. *Southern Ry. Co.*, (No. 433, April 10, 1950, not yet officially reported) 70 S. Ct. 585, 586; *Order of Ry.*

*Conductors of America* v. *Pitney et al.*, 326 U. S. 561, 567, 568, 66 S. Ct. 322; *General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Missouri-Kansas-Texas R. R.* v. *Missouri-Kansas-Texas R. R. Co.*, 320 U. S. 323, 334, 335, 336, 337, 64 S. Ct. 146.

3. The Court of Appeals has also decided the important question of Federal law as to the jurisdiction of a Federal Court to judicially review the awards of the National Railroad Adjustment Board, in a collateral proceeding, in favor of such jurisdiction. The decision of the Court of Appeals is probably in conflict with the applicable decisions of this Court and with the terms and provisions of the Railway Labor Act itself. *Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297, 300, 305, 64 S. Ct. 95; see also dissent in *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U. S. 711, 761, 65 S. Ct. 1282; also 45 U. S. C., § 153 First (m), (o), (p).

4. The Court of Appeals has also decided the important question of Federal law as to the jurisdiction of a Federal Court to determine the craft classification of persons claiming to be employees to establish the jurisdiction of the National Railroad Adjustment Board, First Division, over disputes between such persons and the Carrier, in favor of the Court's jurisdiction. In so deciding, the decision of the Court of Appeals is probably in conflict with the applicable decisions of this Court. *Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297, 300, 301, 302, 64 S. Ct. 95; *General Committee of Adjustment of Brotherhood of Locomotive Engineers for the Missouri-Kansas-Texas R. R.* v. *Missouri-Kansas-Texas R. R. Co.*, 320 U. S. 323, 331, 332, 333, 334, 335, 64 S. Ct. 146; *General Committee of Adjustment of Brotherhood of Locomotive Engineers* v. *Southern Pac. Co. et al.*, 320 U. S. 338, 343, 344, 64 S. Ct. 142.

## QUESTIONS PRESENTED.

1. After awards of the National Railroad Adjustment Board, First Division, have been rendered, which decide a dispute between the collective agent and the Carrier as

to the interpretation and application of the parties' collective agreement and which are wholly valid between those parties and with which the Carrier refuses to comply, are those parties subsequently prohibited from treating such dispute as an open question for settlement on the Carrier's property by conference and negotiation and reaching a valid and enforceable collective agreement, prospective in application and fixing for the future the right of the parties with respect to certain of the Carrier's work, where the members of another group, who are neither party nor privy to the contracts between the collective agent and the Carrier, long after the awards and the putting into effect by the Carrier of the collective agreement thus made, assert in an injunction suit a claim of right to the same work and secure an adjudication by a federal court that the awards are void as to them for lack of notice.

The question presents the issue as to whether, at any stage of a dispute between a collective agent and a Carrier, a limitation is to be imposed upon the collective bargaining power and authority conferred by the Railway Labor Act to settle for the future, by collective agreement, rights between the parties to those agreements. If such limitation does exist, then it can, and in this case it does, completely nullify the collective bargaining procedure created by the Railway Labor Act and thereby abrogates the congressional will as expressed in the declared purposes of the Act. Railway Labor Act, 1934, 45 U. S. C., § 151 a, 152 First, 152 Ninth. So far as petitioner is informed, this question has never been decided by this Court.

2. Does the federal court have jurisdiction to interpret and apply collective agreements between a collective bargaining agent and a Carrier, and also to interpret and apply the relation between the Carrier and the members of a group who have no collective agreement with the Carrier, but who claim an independent employment status with the Carrier, and by injunctive decree settle a jurisdictional labor dispute between the Carrier and such adversary labor groups?

This question presents an issue of probable conflict between the decision of the Court of Appeals and the applicable decisions of this Court. *Slocum* v. *Delaware L. & W. R. Co.*, (No. 391, April 10, 1950, not yet officially reported) 70 S. Ct. 577, 579, 580; *Order of Railway Conductors of America* v. *Southern Ry. Co.*, (No. 438, April 10, 1950, not yet officially reported) 70 S. Ct. 585, 586; *Order of Railway Conductors of America* v. *Pitney*, 326 U. S. 561, 567, 568, 66 S. Ct. 322; *General Committee of Adjustment of Brotherhood of Locomotive Engineers for M-K-T R. R.* v. *M-K-T R. R. Co.*, 320 U. S. 323, 334-337, 64 S. Ct. 146.

3. Does the federal court have jurisdiction to decide that the members of a group who are, at best, employees of the Carrier at will, when doing the Carrier's work, but who have no collective contract or seniority rights with the Carrier, belong to a particular craft of the Carrier's employees, to establish jurisdiction of the National Railroad Adjustment Board, First Division, over a dispute involving such craft, or does the Railway Labor Act vest such jurisdiction exclusively in the National Mediation Board or in the National Railroad Adjustment Board, First Division, in a proper case calling for a determination of its own jurisdiction, the facts being that such question has never been submitted to nor passed upon by either agency. (Railway Labor Act, 1934, 45 U. S. C., § 152 Ninth, 153 First (h); *Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297, 300, 301, 302, 64 S. Ct. 95; *General Committee of Adjustment of Brotherhood of Locomotive Engineers for the M-K-T R. R.* v. *M-K-T R. R. Co.*, 320 U. S. 323, 331-335, 64 S. Ct. 146; *General Committee of Adjustment of the Brotherhood of Locomotive Engineers* v. *Southern Pac. Co. et al.*, 320 U. S. 338, 343, 344, 64 S. Ct. 142.

4. In a situation where the National Railroad Adjustment Board, First Division, has rendered awards deciding a dispute between a collective agent and the Carrier as to a proper interpretation and application of the collective agent's agreement with the Carrier in favor of the collective agent's contended for interpretation and application, does a federal court have jurisdiction to judicially review

such awards in a collateral attack thereon by an injunction suit brought on behalf of a class who are neither party nor privy to the collective agreement involved, and to declare the Board's awards void as being beyond and in excess of the Board's jurisdiction to make the same, for the assigned reason that said awards did not interpret and apply the contract between the collective agent and the Carrier, but wrote a new contract for those parties?

This question presents the issue as to whether the federal court in such a case may judicially review the final awards of the National Railroad Adjustment Board and thus raises an issue of probable conflict between the decision of the Court of Appeals and the applicable decisions of this Court. Railway Labor Act, 1934, 45 U. S. C., § 153 First (m), (o), (p); *Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297, 300-305, 64 S. Ct. 95. See also dissent in *Elgin J. & E. Ry. Co.* v. *Burley*, 325 U. S. 711, 761, 65 S. Ct. 1282.

5. This case also involves the question as to whether the jurisdictional amount of $3,000.00, necessary to sustain federal jurisdiction (Title 28, U. S. C., § 1331, 1332) has been proved in this "spurious" class action brought under Rule 23 (a) (3), Federal Rules of Civil Procedure. *Lion Bonding & Surety Co.* v. *Karatz*, 262 U. S. 77, 85, 86, 43 S. Ct. 480.

## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. As to the first question, the Court of Appeals has decided an important question of Federal law which, so far as your petitioner is informed, has not been decided by this Court but which should be settled by this Court.

In *Elgin J. & E. Ry. Co.* v. *Burley*, 325 U. S. 711, 739, 65 S. Ct. 1282, this Court declared:

> "* * * The collective bargaining power is not exhausted by being once exercised; it covers changing the terms of an existing agreement as well as making one in the first place."

Here, in a collateral attack in an injunction suit, the Court of Appeals has decided not only that the Board's awards are void but that the petitioner's agreement of February 3, 1944 (B.R.T. Ex. 4, R. 511-513), with the carrier, which of itself settles for the future the petitioner's claim that the trainmen employees of the carrier, holding seniority as Brakemen, have the exclusive right to perform the carrier's baggage work, is, together with other agreements, void because the principle which the awards uphold is the same principle that is the subject matter of the agreement.

Is it the law then, that once an issue between a collective agent and the carrier has been submitted to the Board and a decision thereon rendered, which the carrier party refuses to recognize, that such issue cannot thereafter be treated as an open question and settled between those parties by collective agreement? The solution of this question is of vital importance to all the employees of the railroad world who depend upon the collective agreements made by their representatives with the carrier employers. If collective agreements thus made are open to the collateral attack that is made in this case, of what substance is the power and authority to bargain collectively that is conferred by the Railway Labor Act in the first place? When this power to so settle disputes is limited, the whole purpose of the Act fails.

2. In this case there is a jurisdictional labor dispute between the Carrier and your Petitioner and the Express Messengers over the right to perform the Carrier's baggage work. The decision of the Court of Appeals determines this dispute by holding (R. 637, 638, 639) that the District Court had jurisdiction to determine the intent of the parties to the February 3, 1944, agreement (B.R.T. Ex. 4) (R. 511-513)* and *"to construe and determine the legal effect thereof."* By affirming the decree of the District Court, the Court has declared that the Board did not interpret the basic collective agreement (Santa Fe's Exhibit 4, on file with this Court) but wrote a new contract (R. 77) which is also to hold that the District Court had jurisdiction to interpret that contract.

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***Mistakenly referred to in the Court's opinion (R. 638) as an agreement of February 4, 1945.**

Without one or the other of these rulings, the decision reached by the Court could not have been made, for unless there is a limitation on the collective bargaining power conferred by the Railway Labor Act, the Court's holding that the awards are void as to the Express Messengers on the assigned ground that they are in violation of § 153 First (j) of the Railway Labor Act and the due process clause of the Fifth Amendment to the Constitution would have no bearing in view of the February 3, 1944, agreement made subsequent to the awards.

Also, as shown by the decision of the Court of Appeals, the Court has held as a condition precedent to declaring the awards to be void on the grounds mentioned, that the District Court had jurisdiction to determine the matter as to the employment rights claimed by the Express Messengers and to declare their employment status.

In so deciding the case the Court of Appeals has decided a federal question involving the operation of the Railway Labor Act in a way probably in conflict with the applicable decisions of this Court in *Slocum* v. *Delaware L. & W. R. Co.*, (No. 391, April 10, 1950, not yet officially reported) 70 S. Ct. 577, 579, 580; *Order of Ry. Conductors of America* v. *Southern Ry. Co.*, (No. 438, April 10, 1950, not yet officially reported) 70 S. Ct. 585, 586; *Order of Ry. Conductors of America* v. *Pitney*, 326 U. S. 561, 567, 568, 66 S. Ct. 322.

3. As a condition precedent to declaring the Board's awards invalid as to the Express Messengers for lack of due process and in violation of § 153 First (j), the Court of Appeals holds that as employees at will they are members of the "Trainmen" craft of employees of the Carrier within the meaning of § 153 First (h), which establishes the jurisdiction of the National Railroad Adjustment Board, First Division. Does a federal court have this jurisdiction or is this jurisdiction to determine craft classification vested in the National Mediation Board or in the Adjustment Board in a proper case calling for the determination of its own jurisdiction? (45 U. S. C., § 152 Ninth.) The Court of Appeals has decided this federal question in a way probably in conflict with the applicable decisions of this Court, in *Switchmen's Union of North America* v. *National*

*Mediation Board,* 320 U. S. 297, 300, 301, 302, 64 S. Ct. 95; *General Committee of Adjustment of Brotherhood of Locomotive Engineers for the M-K-T R. R.* v. *M-K-T R. R. Co.,* 320 U. S. 323, 331, 335, 64 S. Ct. 146; *General Committee of Adjustment of the Brotherhood of Locomotive Engineers* v. *Southern Pac. Co. et al.,* 320 U. S. 338, 343, 344, 64 S. Ct. 142.

4. This case also presents the issue as to whether, in a collateral attack by an injunction suit, a federal court may judicially review the Board's awards and declare that the Board acted beyond and in excess of its jurisdiction and that its awards are, therefore, void (R. 77). The decision of the Court of Appeals of this federal question is probably in conflict with the applicable decisions of this Court in *Switchmen's Union of North America* v. *National Mediation Board,* 320 U. S. 297, 300-305, 64 S. Ct. 95. See also dissent in *Elgin J. & E. Ry. Co.* v. *Burley,* 325 U. S. 711, 761, 65 S. Ct. 1282. Also see 45 U. S. C., § 153 First (m), (o), (p).

Wherefore, your Petitioner prays that this Court issue its writ of certiorari to the United States Court of Appeals for the Eighth Circuit to the end that the important and substantial questions of federal law herein presented may be decided and settled.

Respectfully submitted,

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# Supreme Court of the United States

OCTOBER TERM, A. D., 1949.

**No. .....**

BROTHERHOOD OF RAILROAD TRAINMEN, A VOLUNTARY UNINCORPORATED ASSOCIATION, PETITIONER,

VS.

HAROLD H. TEMPLETON, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, A CORPORATION, AND PANHANDLE AND SANTA FE RAILWAY, COMPANY, A CORPORATION, RESPONDENTS.

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### Opinions of Courts Below.

The opinion of the United States Court of Appeals for the Eighth Circuit (R. 623-640) is reported in 181 F. 2d 527. The District Court rendered no opinion but made Findings of Fact and Conclusions of Law (R. 63-76), which are reported in 84 F. Supp. 162.

**Jurisdiction.**

A statement showing the jurisdiction of this Court appears at pages 7-9, of the preceding petition and is herewith adopted as the jurisdictional statement of this brief.

**Statement of the Case.**

This has already been stated in the preceding petition under the heading "Summary Statement of the Matters Involved," pages 2-7, which is hereby adopted and made a part of this brief.

**Assignments of Error Intended to Be Urged.**

The Circuit Court of Appeals erred:

1. In holding the February 3, 1944, agreement (B.R.T. Ex. 4, R. 511-513) void as being only an implementation of the awards of the National Railroad Adjustment Board, First Division.

2. In holding paragraphs 2, 3 and 4 of the April 27, 1944, agreement (B.R.T. Ex. 5, R. 515, 516, 517) void as being only an implementation of the Board's awards.

3. In holding that the February 3, 1944, agreement (B.R.T. Ex. 4, R. 511-513) is not a collective bargaining agreement, amendatory of the basic collective agreement (Santa Fe Ex. 4 on file with this Court), prospective in application and settling a dispute as between petitioner and the carrier as to employment rights *in futuro.*

4. In holding that the agreements embodied in paragraphs 2, 3 and 4 of the April 27, 1944, agreement (B.R.T. Ex. 5, R. 515, 516, 517) are not collective agreements amendatory of the basic collective agreement (Santa Fe Ex. 4 on file with the Court), prospective in application and establishing employment rights *in futuro.*

5. In holding that the District Court had jurisdiction of the subject matter of the action, because:

The Court was without jurisdiction to determine the jurisdictional labor dispute between the carrier, your peti-

tioner and the Express Messengers, and to construe and interpret the collective agreements between petitioner and the carrier or to construe and interpret the employment relation with the carrier claimed by the Express Messengers.

6. In holding that in a collateral attack by an injunction suit, the District Court had jurisdiction to judicially review the awards of the National Railroad Adjustment Board, First Division, and to declare those awards void on the ground that the Board acted beyond and in excess of its jurisdiction in making the same.

7. In holding that the District Court had jurisdiction to determine the craft classification of the Express Messengers and in sustaining the conclusion that as employees at will, they were "Trainmen" employees of the carrier within the purview of § 153 First (h) of the Railway Labor Act, 45 U. S. C., § 153 First (h).

8. In holding the awards of the Board void as to the Express Messengers as being in violation of the notice provision of the Railway Labor Act, 45 U. S. C., § 153 First (j), and of the due process clause of the Fifth Amendment to the Constitution of the United States.

9. In holding the amount of $3,000.00, exclusive of interest and costs, necessary to sustain Federal jurisdiction in this case, Tit. 28, U. S. C., § 1331, 1332(a), may be obtained by aggregating the value of the several rights of the individuals involved in a "spurious" class action, such as this one, brought under Rule 23 (a) (3), Federal Rules of Civil Procedure.

(Sections of the Railway Labor Act of 1934, referred to in the preceding petition and in this brief, are printed in the Appendix attached hereto.)

## ARGUMENT.

### I.

**This Court should decide whether a collective bargaining agreement is void for the reason that the subject matter thereof involves the subject matter of a dispute previously decided by the National Railroad Adjustment Board, First Division, by awards which, on collateral attack by third persons, the Court of Appeals has declared are void.**

The background of this question rests upon these facts. The Brakemen employees of the Santa Fe on its Eastern and Western Lines, covered by the B.R.T.'s collective bargaining contract with the Santa Fe (Santa Fe Ex. 4 on file with this Court), in addition to from time to time actually handling the baggage work on a number of its trains, have for many years, at least from 1914 (R. 462, 463, 464), been claiming the right to do the baggage work on the Eastern and Western Lines under the Trainmen's contract. In June of 1931, the Santa Fe displaced twelve baggagemen on its trains 3 and 4, in favor of Fred Harvey barber employees (See statement of claim and Employees' statement of facts, Pltf's. Exhibit A, Award 143, R. 125). The protest over this action was lodged with the National Railroad Adjustment Board, First Division, which proceeding resulted in Award 143, in favor of the claimed interpretation and application of the contract (Pltf's. Ex. A, R. 125, 126, 129).

Following the rendition of Award 143, conference and negotiation ensued between the petitioner and the Santa Fe, as a result of which the dispute decided by the award was settled about March 31, 1936, with the restoration of the men, on whose behalf the protest was made, to their baggage jobs (See reference Award 143, Pltf's. Ex. B, R. 130, 142).

About April 1, 1938, Santa Fe discontinued the services of the men then handling its baggage on trains 3 and 4. When these trains were restored in May of 1938, the

Santa Fe, instead of reinstating these men, inaugurated joint service on those trains and used Express Messengers in the employ of the Railway Express Agency to handle the baggage. This arrangement was promptly protested by the petitioner and the request made, among other things, that the men discontinued be restored. This dispute became the matter of conference and negotiation and was taken to the National Railroad Adjustment Board, First Division (See Award 6635, Docket No. 7684, Pltf's. Ex. B, R. 130-177, 133, 134). In this proceeding, it was again contended that based upon a correct interpretation and application of the Trainmen's agreement (Santa Fe Ex. 4 on file with this Court) and Article XXIII thereof, and on the seniority rules in Article XXII and the rate schedules in Article I, the men who had been displaced were entitled to the baggage work (R. 130, Santa Fe Ex. 4, Art. XXIII, p. 31; Art. XXII, pp. 27-31; Art. I, pp. 1-8). The findings and the award of the Board sustained that contention (R. 174, 175).

Apparently while the proceedings before the Board in Award 6635 were still pending, the Santa Fe, about January 14, 1940, displaced four of its Trainmen employees holding seniority as Brakemen, who prior to that date had been regularly assigned to handle baggage work on two of the Santa Fe's other trains. This action of the Santa Fe was protested and processed to the Adjustment Board, First Division, in Award 6636, Docket No. 10405 (Pltf's. Ex. C, R. 177-219). The claim made was predicated upon the continuing contention that under a proper interpretation and application of the Trainmen's agreement, Santa Fe Ex. 4, and of the provisions of Arts. XXIII and XXII, and of Art. I, above mentioned, these men were entitled to the baggage work. Also, the general two-fold claim was made that the handling of baggage on any and all of the trains of the Santa Fe properly belonged to Trainmen employees holding seniority as Brakemen and that any deviation from this interpretation and application of the contract was properly a subject of negotiation and agreement between the Santa Fe and petitioner (See Ex. C, R. 178). By its findings and award, the Board sustained all of these claims (R. 217).

About the same time the protests and claims in Awards 6635 and 6636 were pending before the Board, similar claims

were asserted against the Santa Fe arising out of the fact that the Santa Fe had been using Fred Harvey barbers and news agents rather than Brakemen to handle baggage on some of its trains. The claims were processed to the First Division of the Board and were sustained by the Board's awards (Pltf's. Ex. D, Award 6637, Docket No. 7685, R. 219-247-249; Pltf's. Ex. E, Award 6638, Docket No. 7686, R. 249, 265-266; Pltf's. Ex. F, Award 6639, Docket 8687, R. 267-282-285).

Awards 6635 to 6639, inclusive, were all handed down by the Board on April 20, 1942 (R. 175, 217, 247, 265, 283). Thereafter, the Santa Fe continued to refuse to recognize the Trainmen's contention as to the interpretation and application of their contract on the Eastern and Western Lines, and consistent therewith did not apply any of the Board's awards, but filed petitions for rehearing (R. 484, 485, 530, 532).

So far as the record discloses, this dispute continued *in status quo* until October 26, 1943, at which time there was a conference between Mr. A. F. Whitney, then President of the petitioner, and Mr. E. J. Engel, then President of the Santa Fe, in Mr. Engel's office in Chicago. Out of this conference of the two chief executive officers of both organizations came the Whitney-Engel Memorandum B.R.T., Ex. 1, R. 505, 506), wherein it was agreed that a number of cases, including the cases involving these awards, were open questions and that conferences would be arranged to make an honest effort to reach a mutual agreement as to the disposition of these questions. The plan to withdraw cases from the Adjustment Board and to make an attempt to settle them on the Carrier's property by conference is outlined by Mr. Engel's letter to Mr. Whitney of November 19, 1943 (B.R.T. Ex. 8, R. 527-530). Subsequently, conferences ensued between the representatives of each organization, as a result of which a series of agreements were entered into.

The first agreement was made January 26, 1944 (B. R.T. Ex. 2, R. 506-508), the next January 27, 1944 (B.R.T. Ex. 3, R. 509-511), the third, February 3, 1944 (B.R.T. Ex. 4, R. 511-513) and the fourth and last on April 27, 1944 (B.R.T. Ex. 5, R. 514-521).

B.R.T. Exhibits 2, 3 and 5 settle past grievances. B.R.T. Ex. 4, however, is a completely independent agreement. It settles the continuing dispute between the petitioner and the Santa Fe as to the proper interpretation and application of the Trainmen's contract, Santa Fe Ex. 4, and particularly Art. XXIII thereof, and embodies within its terms an agreed upon interpretation or amendment, fixing for the future the right of the Brakemen to handle the Santa Fe's baggage work. Art. XXIII of the Trainmen's contract (Santa Fe Ex. 4, p. 31) provides:

> "(a) All vacancies occurring in baggage runs not controlled by joint service shall be filled from the ranks of eligible and competent brakemen; oldest brakemen to have preference in all extra or special runs or excursion trains.
>
> "(b) When a brakeman is required to take charge of or handle baggage, regular or extra brakemen shall perform the service; oldest man to have the preference."

As will be noted from the statements as to the respective positions of the petitioner and the Santa Fe, in Awards 6635 to 6639, the bone of contention as to the petitioner's claimed interpretation of the agreement centered around this language of Art. XXIII:

"* * * vacancies * * * not controlled by joint service * * *" B.R.T. Ex. 4, the agreement of February 3, 1944, refers specifically to the application of Art XXIII, and in paragraph (2) (R. 512) the controversial language above quoted is read out of the basic contract, Santa Fe Ex. 4—

> "Vacancies or new assignments in baggage service shall be advertised for a period of five days and the senior qualified brakeman making application therefor shall be assigned."

This agreement evidences the mutual agreement of the parties to fix rights *in futuro*, after conference between the designated representatives of the parties, authorized so to confer. § 2 Second, Railway Labor Act of 1934, Title 45, U. S. C., § 152 Second and is the fulfillment

of the statutory duty so to confer and bargain imposed upon both parties by the Railway Labor Act. § 2 First, Railway Labor Act of 1934, § 152 First, Second, Title 45 U. S. C.; *Elgin J. & E. Ry. Co.* v. *Burley*, 325 U. S. 711, 728, 729, 739, 65 S. Ct. 1282; *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 547, 548, 57 S. Ct. 392; *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, 346, 347, 64 S. Ct. 582.

B.R.T. Ex. 5, the April 27, 1944, agreement, did not settle past grievances alone. Paragraph 4 (a) of that agreement creates for the first time a new classification of Brakemen-Baggagemen and amends Art. I of the Trainmen's agreement (Santa Fe Ex. 4, Art. I, pp. 1-8) to provide for the classification and rate of pay for such classification. This agreement likewise covers a matter which is the subject of collective bargaining and is prospective in application and, as such, is the result of the valid exercise of the collective bargaining power. *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 331 U. S. 342, 347, 64 S. Ct. 582.

These agreements, to the extent that they do settle for the future this dispute between the petitioner and the Santa Fe, are as a matter of law collective bargaining agreements. In the *Burley case, supra*, l. c. 739, this Court declared with respect to the collective bargaining power conferred by the Railway Labor Act:

> "It includes the power to make a new agreement settling for the future a dispute concerning the coverage or meaning of a pre-existing collective agreement. For the collective bargaining power is not exhausted by being once exercised; it covers changing the terms of an existing agreement as well as making one in the first place."

Due to the man-power shortage existing at the time of the February 3, 1944, agreement, the effective date of these agreements was, by mutual agreement between the Carrier and the petitioner, deferred until September 15, 1945, when the baggage work on the Eastern and Western Lines was assigned to the brakemen, who are still doing the work,

pending the ultimate decision of this case. It was not until June 26, 1946, that the Express Messengers brought this collateral attack suit—more than four years after the Awards, and eight months after joint service had been terminated by the Santa Fe. Their claims that the awards are void as to them, and that the agreements, including the February 3, 1944, agreement, and paragraph 4 of the April 27, 1944, agreement, are void as being an implementation of the awards have been sustained by the Court of Appeals. The decision of the Court sharply points up the question as to whether there is such a limitation and restriction upon the collective bargaining power and authority conferred by the Act, a limitation or restriction which, if it exists, completely nullifies collective bargaining procedures and obliterates the very purposes of the Act, as declared in § 1 a, and inherent in § 2 First, 45 U. S. C., § 151a, 152 First. So far as your petitioner is informed, this question of Federal law has never been decided by this Court and it is of such grave importance to all employees of the railroad world, covered by collective agreements, including the Brakemen employees of the Santa Fe represented by your petitioner in this case, that your petitioner earnestly contends that it is a question which this Court should settle.

II.

**This Court should resolve the probable conflict between the decision of the Court of Appeals and the applicable decisions of this Court on the question of a federal court's jurisdiction to determine a jurisdictional labor dispute arising under the Railway Labor Act, and to interpret and apply collective agreements and employment relations between the Carrier and those claiming under the same.**

The agreements of February 3, 1944, and April 27, 1944 (B.R.T. Exs. 4 and 5), are, to the extent heretofore pointed out, collective bargaining agreements amendatory of the preexisting basic contract (S. Fe's Exhibit 4) and a part of it. The issue, as framed by the bill of complaint (R. 1-2), B. of R.T.'s amended answer (R. 22-38), the Santa Fe's answer (R. 13-17) and the respec-

tive replies of the plaintiff (R. 42-45) and the Santa Fe (R. 39-41) is whether, under the Trainmen's contract, as amended, the Trainmen employees of the Santa Fe holding seniority as Brakemen as of September 15, 1945, the date on which joint service was discontinued on the Eastern and Western Lines, had the exclusive right to the baggage work on the Santa Fe trains on said Lines. The Trainmen claim the right under their contracts with the Santa Fe. The Santa Fe claims that under these contracts the Trainmen are not entitled to the work. The Express Messengers claim the right by virtue of alleged individual contracts founded on custom or practice, or, as the Court of Appeals has held, by virtue of individual employment at the will of the Santa Fe. The Santa Fe claims the Express Messengers have no right whatever to the baggage work. As to both contestants, the Santa Fe claims that it has the right to assign the work to whomever it pleases, whenever it pleases. The jurisdictional labor dispute thus presented involves a controversy that is not justiciable in federal courts. It is one arising under the Railway Labor Act and rests solely and exclusively within the jurisdiction of the National Railroad Adjustment Board to determine. The question presented was squarely raised by the Petitioner's motion to dismiss in the District Court (R. 21, 22) and in its amended answer (R. 37, 38) and was preserved on the appeal to the Court of Appeals.

The Court of Appeals did, in its findings and conclusions (R. 73(3)) sustain the District Court's jurisdiction to interpret and apply both the employment relation claimed by the Express Messengers and the agreements of February 3, 1944, and April 27, 1944 (R. 636, 637, 638). In these findings and conclusions the Court has held, not only that the Express Messengers are employees at will but it has expressly assumed the right to determine the intent of the February 3, 1944, and April 27, 1944, agreements and to construe and determine the legal effect thereof (R. 638, 639). Also, the Court of Appeals, by its affirmance of the District Court's decree, which embodies in it the District Court's conclusion that the Adjustment Board did not interpret and apply the pre-existing contract, but wrote a new contract for the parties (R. 76, 77) sustains the Dis-

trict Court's jurisdiction to interpret that contract. This Court, in *Slocum* v. *Delaware L. & W. R. Co.,* (No. 391, April 10, 1950, not yet officially reported) 70 S. Ct. 577, 579, 580, declares:

> "* * * Our ground for this holding was that the court 'should not have interpreted the contracts * * *' but should have left this question for determination by the Adjustment Board, a congressionally designated agency peculiarly competent in this field. 326 U. S., at pages 567-568, 66 S. Ct., at page 325, 90 L. Ed. 318. This reasoning equally supports a denial of power in any court—state as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act."

The decision of the Court of Appeals is probably not only in conflict with the decision of this Court in the *Slocum case, supra,* but also with the decisions of this Court in *Order of Ry. Conductors of America* v. *Southern Ry. Co.,* (No. 438, April 10, 1950, not yet officially reported) 70 S. Ct. 585, 586; *Order of Ry. Conductors of America* v. *Pitney et al.,* 326 U. S. 561, 567, 568, 66 S. Ct. 322; *Switchmen's Union of North America* v. *National Mediation Board,* 320 U. S. 297, 300, 301, 302, 303, 64 S. Ct. 95; *General Committee of Adjustment of Brotherhood of Locomotive Engineers for the Missouri-Kansas-Texas R. R. Co.* v. *Missouri-Kansas-Texas R. R. Co.,* 320 U. S. 323, 334, 335, 336, 337, 64 S. Ct. 146.

## III.

**This Court should resolve the probable conflict between the decision of the Court of Appeals and the applicable decisions of this Court on the question of the jurisdiction of a federal court to determine the craft classification of alleged employees of the Carrier under § 3, First, (h) of the Railway Labor Act of 1934 (45 U. S. C., § 153, First (h)).**

In holding that the Express Messengers, when in joint service, were Trainmen within the purview of § 3 (h) of the Railway Labor Act of 1934 (Title 45, U. S. C., § 153(h)), (R. 637), the Court of Appeals holds that the District Court had jurisdiction to make that determination

of craft classification so as to include the Express Messengers in a craft of train service employees of the Santa Fe over which the Adjustment Board, First Division, did have jurisdiction. So far as the record in this case discloses, there has never been any question but that the Express Messenger employees of the Railway Express Agency are members of the express employees craft over which the Adjustment Board, Third Division, has jurisdiction (45 U. S. C., § 153(h)). Also it is true that as members of the express employees craft the Express Messengers have their own collective bargaining agent, namely, the Clerks Union. The determination of the craft classification in this case has a direct bearing upon the issue involved as to whether the awards are void as to these Express Messengers for lack of notice. The jurisdiction to determine this craft classification is not vested in the courts but rather, it is vested exclusively in the National Mediation Board created by the Railway Labor Act (45 U. S. C., § 152, Ninth). This conclusion, we urge, is supported by the applicable decisions of this Court and the decision of the Court of Appeals to the contrary is probably in conflict with those decisions. *Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297, 300, 301, 302, 64 S. Ct. 95; *General Committee of Adjustment of Brotherhood of Locomotive Engineers for the Missouri-Kansas-Texas R. R.* v. *Missouri-Kansas-Texas R. R. Co.*, 320 U. S. 323, 331, 332, 333, 334, 335, 64 S. Ct. 146; *General Committee of Adjustment of Brotherhood of Locomotive Engineers* v. *Southern Pac. Co. et al.*, 320 U. S. 338, 343, 344, 64 S. Ct. 142.

This dispute which the Petitioner had with the Santa Fe over the right of the Santa Fe employees holding seniority as Brakemen under the Trainmen's contract (S. Fe's Exhibit 4) concededly came within the jurisdiction of the National Railroad Adjustment Board, First Division, as defined in § 3 (h) of the Railway Labor Act of 1934. Unless the Express Messengers were likewise members of a craft as to whose disputes with the Carrier the First Division would also have jurisdiction, then they would not be employees involved in this particular dispute before the First Division within the meaning of § 3, First

((j), nor would they have been entitled to notice from the Board as to the hearings on that dispute, which is also a requirement of § 3, First (j) Hence, without the Express Messengers having at least first submitted any question that existed as to their proper craft classification to the National Mediation Board for determination, something which the Express Messengers have not done in this case, the awards of the Board cannot, in this collateral attack thereon, be declared void as to them as in violation of the Act and of the Fifth Amendment to the Constitution. Since the courts cannot invade this jurisdiction of the National Mediation Board and since the Express Messengers have not resorted to that Board for the purpose of attempting to establish themselves as employees involved in the dispute within the meaning of § 3 (j), the awards which are otherwise wholly valid between the Santa Fe and the Petitioner are not void.

## IV.

**This Court should resolve the probable conflict between the decision of the Court of Appeals and the applicable decisions of this Court on the question of the jurisdiction of a federal court to judicially review and hold award of the National Railroad Adjustment Board void in a collateral attack thereon upon the ground that the Board exceeded its jurisdiction in making such awards.**

It has been pointed out under Point I of this argument that antedating the February 3, 1944, and April 27, 1944, agreements, the Petitioner, in the proceedings before the Adjustment Board, First Division, resulting in the awards complained of, claimed that under a proper interpretation and application of the then existing contract (S. Fe's Exhibit 4), the Trainmen employees holding seniority as Brakemen with the Santa Fe had the exclusive right to do the Santa Fe's baggage work. The awards sustained that claim.

The decree affirmed by the Court of Appeals in this case embodies within it the decision that the awards of the Board were not premised on an interpretation of the contract but that it wrote a new contract for the parties

which the Board had no jurisdiction to do (R. 77), and for this separate and additional reason holds that the awards are void. The Court of Appeals thus holds that the federal court has jurisdiction to judicially review the awards of the Adjustment Board in a collateral attack proceeding. Not only does the Court have no jurisdiction to judicially review these awards, but implicit in its decision is the Court's interpretation of the Trainmen's contract, an interpretation which, as pointed out under Point II of this argument, the Court had no jurisdiction to make. § 3, First (m) of the Railway Labor Act provides that the awards of the Board shall be final and binding upon both parties to the dispute. § 3, First (o) provides for an order of the Board directed to the Carrier to make the award effective if it is in favor of the petitioner. § 3, First (p) provides for the judicial enforcement of an award in the federal court (45 U. S. C., § 153, First (m), (o), (p)). No where does the Act reserve to the courts the right to judicially review an award in any proceeding in the nature of this one. In upholding the jurisdiction of the federal court to judicially review these awards, the Court of Appeals has decided this important question of federal law in a way probably in conflict with the applicable decisions of this Court. *Switchmen's Union of North America* v. *National Mediation Board,* 320 U. S. 297, 300, 301, 302, 303, 304. See also dissent in *Elgin J. & E. Ry. Co.* v. *Burley,* 325 U. S. 711, 761, 65 S. Ct., 1282, wherein it is said:

> "The Railway Labor Act precludes review of the Board's award;"

also 45 U. S. C., § 153, First (m), (o), (p); *Washington Terminal Co.* v. *Boswell,* 124 F. 2d 235, 241, affirmed by an equally divided court June 14, 1943, 319 U. S. 732, 63 S. Ct. 1430.

## V.

**This Court should decide whether the jurisdictional amount of $3,000.00, necessary to sustain Federal jurisdiction, has been proved in this "spurious" class action brought under Rule 23 (a)(3), Federal Rules of Civil Procedure.**

To sustain Federal jurisdiction, the jurisdictional amount of $3,000.00, exclusive of interest and costs, must be shown. Tit. 28, U. S. C., § 1331, 1332.

The Court of Appeals has decided that the jurisdictional amount was proved in this case (R. 635, 636).

This injunction suit is what is commonly termed a "spurious" class action. It is brought under Rule 23 (a) (3), Federal Rules of Civil Procedure, which provides:

> "(*a*) *Representation.* If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
>
> * * * * * * *
>
> "(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

It is true that in this case, there is a common question of law and fact and that a common relief is sought, in the sense that the plaintiff Templeton, by injunction against the Santa Fe and the petitioner, seeks to reinstate or preserve joint service on Santa Fe trains to the end that he, or the members of his Express Messenger class, who may be eligible to do so under the collective agreement of the Clerks' Union with the Railway Express Agency, might advantage themselves of that service, if they so desire. The right, however, which is claimed and sought to be en-

forced, is wholly several and is not a common right. If the right exists, it belongs to each individual member of the Express Messenger class and as far as the opinion of the Court of Appeals goes, such right is at best only an employment at will, when the individual Express Messenger is doing baggage work in joint service, and it is not protected by any collective agreement with the Santa Fe.

The evidence offered in support of the existence of the jurisdictional amount appears in the Record at R. 421-430. There was no evidence that up to the time of trial, either Mr. Templeton or any of the Express Messengers had lost as much as $3,000.00 by reason of the discontinuance of joint service on September 15, 1945. There was testimony that 54 men had lost wages which, in the aggregate, exceeded $31,000.00 (R. 424, 425). The Court of Appeals holds the right involved to be a common right of all members of the Express Messenger class to an employment they had and depended upon to earn their livelihood (R. 635). Apparently, on the authority of *Nord* v. *Griffin*, 7 Cir., 86 F. 2d 481, the Court treats of this declared right as a continuing right (R. 636). But this case is not like *Nord* v. *Griffin*, where the plaintiff was claiming under a contract which gave him seniority rights to a continued future employment over a period of years. In *Nord* v. *Griffin*, the Court held it was this contractual right to continued employment that should afford the measure of the value of the subject matter in controversy. There is no such contractual right to continued employment involved in this case. Assuming the Express Messengers have any right to employment in joint service, so far as the Santa Fe is concerned, it is no more than what the Court of Appeals has held it to be, namely—a bare employment at will.

If we are correct in this analysis of this question, then the decision of the Court of Appeals that the jurisdictional amount does exist, is probably in conflict with the applicable decisions of this Court.

*Lion Bonding & Surety Co.* v. *Karatz*, 262 U. S. 77, 85, 86, 43 S. Ct. 480.

**Conclusion.**

For all the reasons set forth in the preceding petition and in this supporting brief, your petitioner respectfully prays that this Court's writ of certiorari issue to the Court of Appeals for the Eighth Circuit, in this cause, to the end that the important questions of Federal law involved may be decided by this Court.

Respectfully submitted,

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## APPENDIX.

Pertinent Sections of the Railway Labor Act of 1934 (all references being made to 45 U. S. C., § 151 (ff)) are as follows:

SEC. 151a. GENERAL PURPOSES

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

SEC. 152. GENERAL DUTIES—DUTY OF CARRIERS AND EMPLOYEES TO SETTLE DISPUTES

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Consideration of disputes by representatives

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if

possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Designation of representatives

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees,

assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Agreements to join or not to join labor organizations forbidden

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Conference of representatives; time; place; private agreements

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this

chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Notices of manner of settlement of disputes; posting

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Disputes as to identity of representatives; designation by Mediation Board; secret elections

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the repre-

sentative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

§ 153. NATIONAL RAILROAD ADJUSTMENT BOARD—ESTABLISHMENT; COMPOSITION; POWERS AND DUTIES; DIVISIONS; HEARINGS AND AWARDS

First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is hereby provided—

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This

division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carries growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934,

shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in

which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

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# Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

## No. 180.

BROTHERHOOD OF RAILROAD TRAINMEN, A VOLUNTARY UNINCORPORATED ASSOCIATION, PETITIONER,

VS.

HAROLD H. TEMPLETON, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, A CORPORATION, AND PANHANDLE AND SANTA FE RAILWAY COMPANY, A CORPORATION, RESPONDENTS.

## SUGGESTIONS OF HAROLD H. TEMPLETON, PLAINTIFF-RESPONDENT, IN OPPOSITION TO THE PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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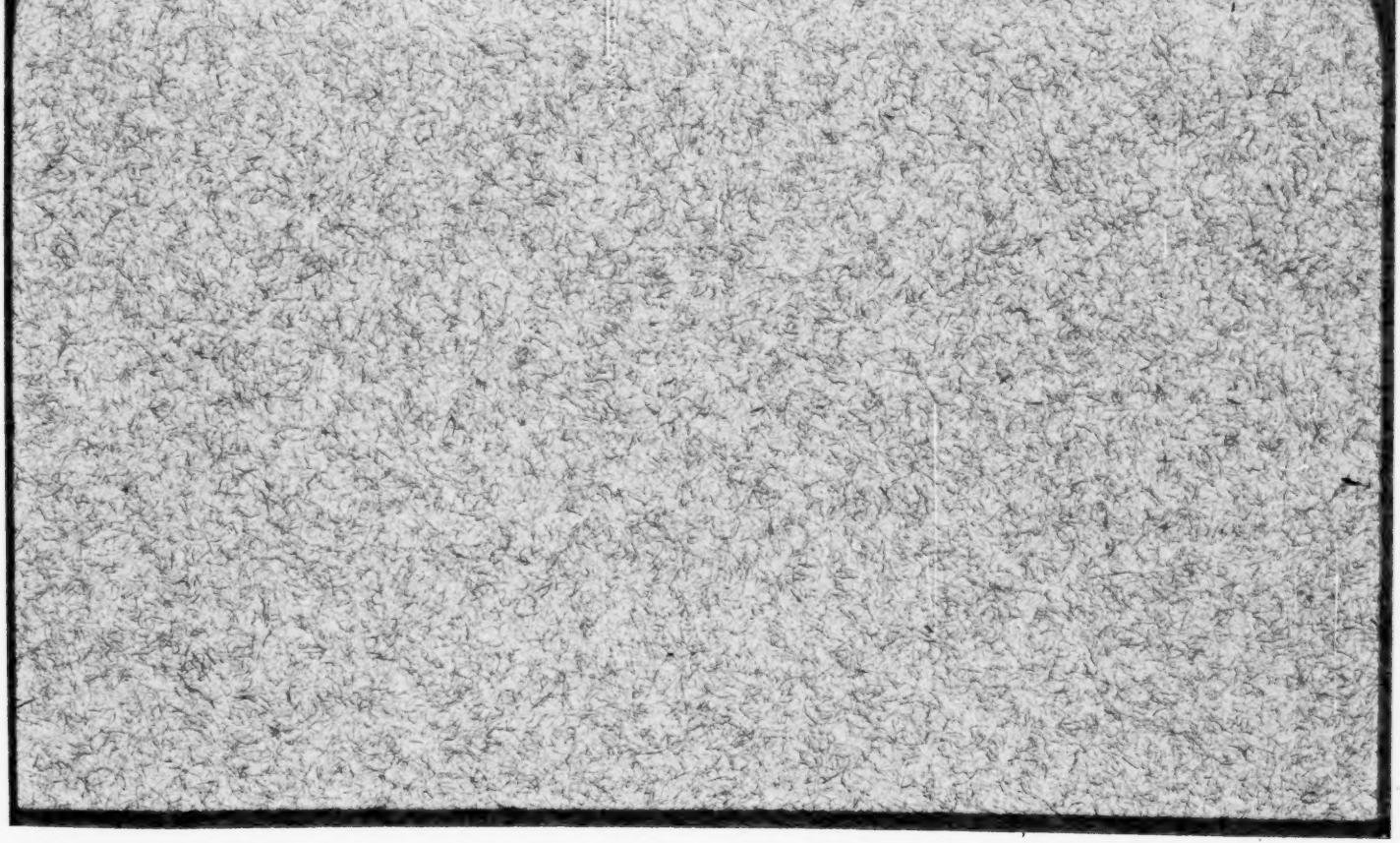

## INDEX

I. The Hester case is not an intervening circumstance within the purview of Rule 33 of this court ..... 5

II and III. Petitioner confesses that Points II and III do not comply with Rule 33 ..... 8

Conclusion ..... 9

### Cases Cited

United States vs. Morgan, 313 U. S. 409, 421 ..... 4

General Talking Pictures Corporation vs. Western Electric Company, Inc., et al., 304 U. S. 175, 546, 58 S. Ct. 849, 851 ..... 5

### Authorities Cited

Railway Labor Act, Section 3 (r) (Title 45, U. S. C. A. 153 (j)) ..... 2

Railway Labor Act, Section 3, First, (e) ..... 2

Supreme Court Rule 33 ..... 4, 5, 8, 9

Fifth Amendment to the Constitution of the United States ..... 2

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**SUGGESTIONS OF HAROLD H. TEMPLETON, PLAINTIFF-RESPONDENT, IN OPPOSITION TO THE PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.**

*To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:*

Plaintiff-Respondent, Harold H. Templeton, respectfully submits to the Court the following response and sug-

gestions in opposition to the Petition of the Brotherhood of Railroad Trainmen for a rehearing of the order of this Court denying its previous petition for a writ of certiorari. The case at bar is properly titled Harold H. Templeton vs. The Atchison, Topeka and Santa Fe Railway Company, a corporation, Panhandle and Santa Fe Railway Company, a corporation, and Brotherhood of Railroad Trainmen, a voluntary, unincorporated association, in which equity suit the trial Court found that the plaintiff-respondent Harold H. Templeton and members of the class of messenger-baggagemen while in joint-service on the Santa Fe were employees of the Santa Fe and that "as such employees, they are and were Trainmen" within the purview of Section 3 (r) (Title 45, U. S. C. A. 153 (j)) of the Railway Labor Act, and entitled to due notice and to be heard in the disputes and proceedings resulting in Awards 6635, 6636, 6637, 6638 and 6639 (Pltf's Exs. B, C, D, E, F) (R. 130-285) (pp. 17-18, Brief of this Respondent in opposition to original petition for writ of certiorari) before the National Railroad Adjustment Board, First Division, in that their employment as "train baggagemen" with the Santa Fe, was directly determined and affected in said proceedings and that therefore said Awards are illegal and void and in violation of the Fifth Amendment to the Constitution of the United States, and that said awards are also void in that in deciding that brakemen are exclusively entitled to handle baggage on any and all trains of the Santa Fe, the National Railroad Adjustment Board did not interpret any existing agreement between the Brotherhood of Railroad Trainmen and the Santa Fe, but in legal effect made a new and different agreement and contract between the two, which action was beyond the authority and jurisdiction of the First Division, as defined in Section 3, First, (e) of the Railway Labor Act (Conclusions of Law (8)) (R. 75), and that the letter agreements (B. of R. T. Exs. 1 to 5, inclu-

sive), entered into between the petitioner B. of R.T. and the Respondent Santa Fe, implemented and gave legal effect to said void awards and are likewise illegal and void (conclusions (9) (2) and (9) (3) (R. 75-76)).

In other words, and as so aptly stated by petitioner, the letter agreements expressly read out of the theretofore existing bargaining agreement aforesaid what petitioner now chooses to call the controversial language of Article XXIII, and substituted therefor terms, schedules, requirements and conditions in exact conformity with the new and different rule, agreement and contract which, in legal effect, the void awards had prescribed. They determined the exact methods and mechanics whereby the awards were to be implemented and enforced. Further proof of such implementation is found in the so-called letter agreements themselves, to-wit: B. of R.T. Exhibit 5, marked Exhibit A, entitled "Illustrative method of distributing penalites due under Claim No. 2 of Award No. 6636 and Awards 6637, 6638, 6639 and 6640 of First Division of National Railroad Adjustment Board, assuming five men would have been needed each calendar day."

The trial Court decreed a permanent injunction and its Findings of Fact and Conclusions of Law (R. 63-76) are reported in 84 F. Supp. 162. The opinion of the United States Court of Appeals for the Eighth Circuit (R. 623-640) affirming the trial court's judgment is reported in 181 F. 2d 527.

It is respectfully submitted that the petition for rehearing should be denied because:

1. It fails to comply with the rules of this Court in the respects hereinafter noted.

2. It fails to indicate any substantial reason why this Court should exercise its judicial discretionary power in granting the writ, even if facts were stated upon which such discretion might be predicated.

Rule 33 of this Court governs petitions for rehearing. The Petition for Rehearing in the case at bar objectively, but only objectively, purports to comply with requirements of the Rule in that it inferentially alleges that many questions decisive of the cause duly submitted by counsel were overlooked by the Court. Actually, there has been no real compliance with the Rule, because all of the questions now presented by Petitioner have been fully presented before and ruled adversely to Petitioner's contentions.

To paraphrase the language of this Court in *United States* v. *Morgan*, 313 U. S. 409, 421, it may be said that "in * * * criticizing this Court's opinion" Petitioner "merely indulged in a practice familiar in the long history of Anglo-American litigation, whereby unsuccessful litigants and lawyers gave vent to their disappointment."

Rule 33 (2), however, was not promulgated for such a purpose, or for the purpose of simply allowing a reargument of questions decided adversely to losing parties. The rule expressly limits a petition for rehearing to a brief and distinct statement of "grounds which are confined to intervening circumstances of substantial or controlling effect or to other substantial grounds available to petitioner although not previously presented."

Counsel for Petitioner fail to certify that the petition is restricted to the grounds specified in the rule. Contrarily, Petitioner confesses that grounds II and III of the Petition do not meet the requirements of Rule 33.

The Bar and the public have long been apprised of the decisions of this Court that failure to comply with its rules is fatal.

It is also a well established rule that concurrent findings of a District Court and a Court of Appeals on questions of fact are not disturbed unless plainly without support in the evidence. In *General Talking Pictures Corporation* v. *Western Electric Company, Inc., et al.*, 304 U. S. 175, 546, 58 S. Ct. 849, 851, it is stated:

> "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. *Southern Power Co.* v. *North Carolina Pub. Serv. Co.*, 263 U. S. 508, 44 S. Ct. 164, 68 L. Ed. 416; *United States* v. *Johnston*, 268 U. S. 220, 227, 45 S. Ct. 496, 69 L. Ed. 925 * * *. They are not to be disturbed unless plainly without support. *United States* v. *Chemical Foundation*, 272 U. S. 1, 14, 47 S. Ct. 1, 6, 71 L. Ed. 131; *United States* v. *McGowan*, 290 U. S. 592, 54 S. Ct. 95, 78 L. Ed. 522; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 58 S. Ct. 300, 82 L. Ed. 374."

If the Petition for Rehearing is not disregarded for failure to comply with Rule 33 it should be overruled promptly because the various contentions all previously made and ruled on are barred.

I.

**The Hester case is not an intervening circumstance within the purview of Rule 33 of this court.**

Petitioner's first point asserts that the filing of the suit entitled *Scott A. Hester et al.* v. *Brotherhood of Railroad Trainmen et al.* is an intervening circumstance within the purview of Rule 33 of this Court but hastens to deny "that the opinion and judgment of the Court of Appeals in the case at bar, affirming the District Court's final decree

of injunction, is in any degree whatever decisive or controlling of any of the matters which are sought to be presented by the complaint in the Hester case." The Petitioner later boastfully contends that: "Suits like the Hester suit are nothing more than harassment of the petitioner."

In the petition for rehearing it is stated that "the petitioner emphatically contends that the opinion and judgment of the Court of Appeals has no controlling effect or bearing whatever on the subject matter of the Hester suit," from which premise the converse may logically be deduced.

The case at bar is clearly distinguishable from the Hester case. The case at bar (Templeton case) is a suit in equity wherein the Court decreed that certain awards of the National Railroad Adjustment Board are void and that certain letter agreements based thereon are also void, as aforesaid, and decreed an injunction. The Hester case is an entirely different suit sounding in tort for damages based on the defendant's wrongful interference with plaintiffs' employment rights. Both are class actions and both actions have to do with various contentions of the joint messenger-baggagemen, but the respective causes of action involve different issues, seek different kinds of relief and the parties to the two suits are not the same.

The case at bar was filed on June 26, 1946. The Hester case was filed on August 25, 1950, which was two weeks before this Court passed on the original petition herein or in ample time for Petitioner to have brought same to the Court's attention if considered a material intervening circumstance. Actually, the case of *John C. Kelley* v. *Brotherhood of Railroad Trainmen,* No. 6137, referred to in the footnote at page 2 of the petition for rehearing

which was filed on December 13, 1949, and voluntarily dismissed on August 25, 1950 (the same date the Hester suit was substituted and filed), involves identically the same issues as the Hester case. Although the Kelley case was filed approximately four months before the case at bar was passed on by the Court of Appeals, no mention of the issues presented in the Kelley case (and subsequently in the Hester case) was made to the Court of Appeals either in the petitioner's briefs or when the case was presented by oral argument on January 10, 1950. The Hester case raises different issues not contained in the record herein and it is not germane to the issues in the case at bar.

Petitioner's contentions are spun around some illogical theory that the so-called "intervening circumstances of the filing of the Hester suit" serve to recreate and emphasize points and authorities previously submitted in the original petition and already passed on by this Court. Such pseudo intervening circumstance is injected into this case now as an open sesame or subterfuge solely for the purpose of reargument of questions and points raised or attempted to be raised in the original petition which was denied. Such denial has barred revival of those same contentions which are again presented in the petition for rehearing.

The points again raised in the petition for rehearing simply prolong the discussion of matters already considered and disposed of, while their effect is nothing more than a criticism of the Court's denial of the original Petition. They do not, therefore, fall within the rule which defines the proper grounds for rehearing.

All of the matters raised by Petitioner in the Petition for Rehearing were fully presented to this Court in the original Petition with the exception that neither the Kelley case nor the Hester case were heretofore mentioned in

connection with the case at bar. Petitioner's declarations that the decree in the case at bar is in no way controlling of any issues presented in the Hester case which is but an harassment of the Petitioner clearly indicate Petitioner's candid appraisal of the alleged intervening circumstance.

Obviously, the contention that the filing of the Hester case is an intervening circumstance within the purview of Rule 33 is wholly wanting in merit and frivolous and for that reason the Petition for Rehearing should be stricken. Since all other points and grounds raised in the Petition for Rehearing are mere repetition of the original petition they are barred. Petitioner has presented no legal or valid reason why the Court should exercise its sound judicial discretion and reconsider matters which are irrelevant and improper at this stage of the present proceedings.

## II AND III.

**Petitioner confesses that Points II and III do not comply with Rule 33.**

Plaintiff-Respondent passes the Petitioner's reargument of all points fully covered in the original petition and fully answered by respondent and ruled on by this Court. Rather than burden the Court further Respondent pauses merely to point out that in its certificate the Petitioner confesses that its grounds II and III do not comply with Rule 33.

## CONCLUSION.

It is respectfully submitted that the Petition for Rehearing should be denied first, because it does not comply with Rule 33 of this Court, and second, because it presents no question decisive of the cause which has not been previously brought to the Court's attention in the original petition. Every question suggested in the petition for rehearing was presented to the Court in the original Petition for Writ of Certiorari.

Respectfully submitted,

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